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The William B. Lockhart Lecture

The Hardest Question in Constitutional Law

Mark V. Tushnet*

I. THE BASIC PROBLEM

Suppose you were a Democratic senator during the spring of 1994, when Justice Byron White announced his retirement from the Supreme Court. Suppose also that President Bill Clinton announced his intention to nominate Senator George Mitchell, your majority leader, to fill the impending vacancy. A problem would arise in connection with the nomination. In 1989, Congress had passed a statute increasing the salaries of Supreme Court Justices. Senator Mitchell was serving a term that began in 1988. The Constitution provides that “[n]o Senator . . . shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, . . . the Emoluments whereof shall have been encreased during such time.”¹

The text seems clear enough. If the President appointed Senator Mitchell to the Supreme Court, it would be “during the Time for which he was elected,” and Congress would have increased the “Emoluments” of the position during that time.² A recent convention, however, may avoid the difficulty.³ On sev-

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1. U.S. CONST. art. I, § 6, cl. 2.

2. *Id.*

3. Under some definitions, conventions can supplement the written Constitution. See, e.g., James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and*

eral occasions, Congress has enacted a statute reducing a cabinet member's salary to the point it was at when the newly appointed senator's term began, allowing the senator to take a position as a cabinet member. The theory is that the senator can now accept an appointment to the position because the salary is no longer greater.

This convention is in some tension with the Constitution's text and its apparent purpose.⁴ Textually, the salary "shall have been increased" during Senator Mitchell's term, and rescinding the increase does not mean that the salary "shall not have been increased"; doing so simply means that Congress both increased and reduced the salary during the term.

The provision's purpose is to avoid the corrupting influence that the prospect of an appointment might have on a congressmember's actions. Corruption can take a narrow or broad form. Narrowly, the Framers might have aimed the Emoluments Clause at preventing congressmembers from voting in a manner that benefits one of them monetarily. Or, more broadly, they may have aimed the Clause at barring Congress from passing laws specifically to benefit one of its own members. In the first case one member acts corruptly, while in the second case Congress as a whole acts corruptly. Without such a provision, the President and congressmembers could make a three-part deal. The President could say, "I'll propose a salary increase for a position you are interested in—you name it—if you vote for an important aspect of my political program, and then I'll appoint you to the position."⁵ If the President reneges, the member remains in Congress and can

Public Opinion to Regulate Political Behavior, 40 BUFF. L. REV. 645, 651 (1992) ("Conventions can and do serve many of the same valuable purposes that constitutional legal doctrine should fulfill."). By using the term here, I do not intend to foreclose the possibility that some conventions might displace the written Constitution. I only want to explore the problems associated with a convention that might contradict the written Constitution.

4. See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 908-09 (1994) ("There is no proviso for annulling the violation by decreasing the emoluments at some later time, such as exists in other constitutional provisions . . .").

5. Of course a similar, but less attractive, deal could be offered: "Vote for my program and I'll appoint you to some position you're interested in, as long as Congress has not increased the salary of that position." The deal is less attractive because the congressmember is unable to specify the position in which she is interested. The only way to preclude this sort of deal is to disqualify congressmembers from all civil offices, at least during their terms of service. The Framers appear to have believed that such a disqualification would have deprived the nation of too many valuable services.

retaliate.⁶ Because this sort of corruption is unlikely to occur in open daylight, the system can control it only with a prophylactic rule barring appointment even if there is no direct evidence of a corrupt bargain.

Reducing the salary of a cabinet member may lessen the likelihood of corruption, although such action does not eliminate the problem.⁷ When a Supreme Court position is involved, such a reduction is even less likely to alleviate the problem. Because a cabinet member's term of service is limited,⁸ Congress could reasonably return the position's salary to the level it was at prior to the congressman's election to her current term for the entire period of the cabinet member's service without serious impact on the member's economic well-being. That solution, however, is unavailable for judges with lifetime appointments. The alternative is to allow Congress to reduce the salary for a brief period and then, when "the Time for which [the appointee] was elected" ends, give the appointee a "catch up" increase.⁹ That, however, would substantially reduce the constitutional provision's anti-corruption effect. In exchange for a relatively short-term loss, the congressman can secure a lifetime appointment and a permanent salary increase.¹⁰

The Emoluments Clause might make it impermissible to rescind the salary increase for a prospective Supreme Court Justice even if its anti-corruption purpose is the narrow one of avoiding the appointment of corrupt individuals. The Clause, however, probably ought to be interpreted as having a broader purpose. The Framers were concerned about the creation of a self-perpetuating national government in which members of

6. This distinguishes appointments during a term of office from appointments after the member leaves office. The President can promise an appointment to a member in exchange for a vote, but once the member leaves office the member has no way to enforce the President's promise.

7. The congressman may find the intangible privileges associated with cabinet service sufficiently attractive to induce her to make a corrupt bargain, trading a vote for a position. If, however, a rescission did eliminate the problem to which the Framers directed the Emoluments Clause because of the kinds of social and political change I have mentioned, perhaps you might take the position that the Clause is best interpreted to authorize a rescission despite its syntax.

8. By political reality, though not by constitutional command.

9. Then-Professor Breyer made this point in a letter to Senator Robert Byrd. 119 CONG. REC. S38,331 (daily ed. Nov. 28, 1973).

10. In any event, this analysis does not overcome the textual difficulty with the salary reduction convention.

Congress and the executive branch would collaborate to separate the governing elite from the people. Even the appearance of self-dealing undermines the relation between representatives and the people. While the narrow reading of the Clause's purpose focuses on the temptations an individual member faces, the broader reading focuses on the systemic impact of making it possible for Congress as an institution to reward some of its members with special legislation. The best understanding of the Emoluments Clause, then, is entirely consistent with its plain language—congressmembers cannot pass laws whose sole apparent purpose is to provide a personal benefit to one of their fellow members.¹¹

Suppose your colleagues in Congress have decided that the President may appoint a person to a position if the temporary salary reduction convention is followed, and a salary reduction statute is in place. The time has come to vote on Senator Mitchell's confirmation. You are convinced that the convention cannot overcome the textual difficulties. You also realize that this sequence of events is precisely what the Framers worried about. But—and here is where the hardest question begins—you also think that the constitutional provision makes no sense today.

The rise of a party system has made implicit trades quite common, so our sense of a corrupt bargain no longer tracks the Framers' understanding. The danger against which the provision guards is no longer a serious one, at least as compared to similar dangers against which the Constitution does not protect us. Further, the rise of an aggressive investigative press has made explicit trades impossible. To the extent that the constitutional provision guards against a real danger, there are now better ways to avoid that danger than the provision's broad prophylactic ban. Finally, you appreciate that the surrounding circumstances may have distorted your judgment about the costs and benefits of the constitutional provision. You know Senator Mitchell, for example, and you are aware that you might be overestimating the distinctive contribution

11. In the words of a witness testifying against the constitutionality of rescinding a salary increase to allow Senator William Saxbe to serve as Attorney-General, the rescission "smacks of clever manipulation" and makes a constitutional provision "the subject of deft maneuver." *To Reduce the Compensation of the Office of Attorney General: Hearings on S. 2673 Before the Comm. on the Judiciary*, 93d Cong., 1st Sess. 43 (1974) [hereinafter *Hearings*] (statement of Dean Willard D. Lorenson).

he can make to the Supreme Court. You are also aware that the Framers were concerned about subtle, imperceptible distortions of judgment that might occur as senators saw one of their colleagues receiving an appointment and thought about the possibility that they too might receive a nomination to such a position.

Still, after careful consideration of the merits and the factors that might have distorted your assessment of the merits, you have concluded that the constitutional provision, applied according to its terms and the Framers' intentions, would deprive the nation of the valuable service Senator Mitchell could provide as a Supreme Court Justice.¹² In short, you have conscientiously decided that the constitutional provision serves no useful purpose.¹³

When you were sworn in, you took the constitutionally prescribed oath "to support this Constitution."¹⁴ Your investigation leads you to conclude that Senator Mitchell's appointment would contravene the Constitution's text and the provision's purposes, and that his appointment would have a very positive impact on the nation. Here is the hardest question in constitutional law: Is it consistent with the entire Constitution for you to vote to confirm Senator Mitchell's appointment, despite your best understanding of a specific, directly contradictory constitutional provision?¹⁵

II. SOME ULTIMATELY UNHELPFUL DODGES

There are a number of dodges designed to make the problem go away.¹⁶ The dodges fall into two categories. The first

12. Colleagues have suggested to me that as a matter of psychology this is an unlikely position for someone to take. Particularly when offered an interpretation of the Emoluments Clause that would allow Senator Mitchell's confirmation, a senator who believes that Senator Mitchell is supremely well-qualified to serve on the Supreme Court is likely to take up the offer, thereby reducing cognitive dissonance.

13. As we will see, you may also think that the provision is silly generally. Not only would you be willing to disregard it in connection with Senator Mitchell's appointment, but you would also be willing to consider disregarding it in connection with all appointments in the future.

14. U.S. CONST. art. VI, cl. 3.

15. It is somewhat more catchy to ask: Will you violate your oath of office if you vote to confirm the nomination? This form of the question fails to highlight the important distinction between the oath with respect to particular constitutional provisions and the oath with respect to the Constitution as a whole.

16. I note another dodge, which I call the *triviality* dodge. I use the

group makes the problem go away by relieving you of responsibility for disregarding your best understanding of the most directly applicable constitutional provision. The second group makes it go away by stipulating that you must follow that understanding.

A. THE JUDICIAL REVIEW DODGE

A ready example of a responsibility relieving dodge is the *judicial review* dodge.¹⁷ If Senator Mitchell is placed on the Supreme Court, the Court itself will eventually face the constitutional question. One variant of the judicial review dodge says that, because the Court will eventually consider the question, you need not. You can argue that this variant does not

Emoluments Clause problem in an effort to get leverage on a deep constitutional problem. Arguably, however, I cannot do so because the Emoluments Clause problem is fundamentally trivial, in the sense that no one could care much how it was resolved. One cannot really use the problem to explore deep questions about the extent to which a representative, executive official, or citizen can properly disregard a constitutional provision that he or she conscientiously regards as trivial. I believe that this dodge fails because it requires its proponent to distinguish between fundamental constitutional provisions and less fundamental ones, which is precisely to engage in the practice of disregarding some constitutional provisions because they seem silly.

I note as well that Sanford Levinson has pointed out the possibility that the peculiar tie-breaking provisions of the Twelfth Amendment can be democratically problematic. Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMMENTARY 183, 185-86 (1995). In conversation, he has focused on the following possibility: One of our major political parties splinters and the spin-off party runs a candidate for President but not for any congressional seats. The presidential election produces a popular plurality of 45% for party A, 40% for party B, and 15% for the splinter party C. The electoral college is divided in the same way, thereby throwing the election to the House of Representatives. Party A wins majorities in enough districts to clinch control of the House. Party B, however, wins majorities of the state delegations in a majority of the states (imagine Party A wins large majorities of the delegations in the nation's largest states while Party B wins majorities in the nation's smallest).

The Twelfth Amendment directs that, "in choosing the President, the votes shall be taken by states, the representation from each state having one vote." U.S. CONST. amend. XII. Under these circumstances one can imagine the presidential candidate of Party B becoming President even though three obvious measures of support (popular and electoral vote pluralities, and a majority of the House of Representatives) favor selecting Party A's candidate. One can spin this scenario out in many ways, and I do not want to place too much weight on it, except to suggest that it raises the possibility that the person charged with certifying the House's vote might decide that, all things considered, she should certify the election of Party A's candidate. That, I take it, would clearly be a non-trivial instance of the problem I address here.

17. This dodge plays an important role in Paulsen's analysis. See Paulsen, *supra* note 4, at 916-17 (discussing judicial review).

compromise your oath of office by noting that you took an oath to support the entire Constitution, which includes the institution of judicial review. You support the Constitution when your actions are subject to judicial review.¹⁸

A second variant of the judicial review dodge says that when the Court considers the constitutional question, it will apply normal interpretive techniques. Assume that these techniques would allow the Court to consider text and purposes, but not whether the provision makes sense today. If the Court concludes that the appointment was invalid because it is inconsistent with text and purposes, what harm have you done? Perhaps the only possible harm that can result is that you will appear not to have followed your oath to support the Constitution.¹⁹ After all, you will have agreed with the Court's consideration of the issues.²⁰

B. PROBLEM DISSOLVING DODGES

Suppose, however, that the judicial review dodge is unavailable because you are convinced that no litigant will ever have standing to challenge the constitutionality of Senator Mitchell's appointment.²¹ The remaining dodges attempt to

18. I should note that I do not myself think this is a sensible accommodation between the oath and a decision not to act as you conscientiously believe the Constitution requires. For present purposes, however, I need not address this variant of the dodge.

19. You will still face a different and difficult question of constitutional theory and practice. The Court has agreed with your understanding of the Emoluments Clause but has disagreed with your interpretation of the responsibilities you have under the Constitution as a whole. To what extent should you take the Court's resolution of the *second* question as authoritative? The same problem would arise, although you are unlikely to find it bothersome, if the Court disagreed with your interpretation of the Emoluments Clause and let Senator Mitchell's appointment stand. That question requires you to develop a theory to deal with *Cooper v. Aaron*, 358 U.S. 1 (1958), and associated problems. I deal with those problems in another part of the work of which this Lecture is one installment.

20. If the Court does consider the full range of issues you have considered, the analysis changes. See *infra* part II.B.2 (discussing the prudentialism dodge).

21. Cf. *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (per curiam) ("It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained . . . a direct injury as the result of that action . . ."). Lévit contended that Hugo Black's appointment to the Supreme Court violated the Emoluments Clause because Congress had improved the Justices' pension plan during Senator Black's term. *Id.* at 633. The Court held that Lévit lacked standing because he suffered an undifferentiated harm "common to all

stipulate the problem away.

1. The Constitutional Amendment Dodge

A second dodge is the *constitutional amendment* dodge. The Constitution itself provides a mechanism, the amendment process, for eliminating provisions that seem silly today. The nation has used this technique in the past and could readily do so again.²² Given the possibility of constitutional amendment, it is inconsistent with the oath of office for a legislator simply to disregard the conclusions of her conscientious examination of the existing constitutional provision.

You think, however, that the amendment process is too cumbersome to deploy in the service of an important but highly technical "correction" of the Constitution. It certainly could not ensure Senator Mitchell's appointment. Further, you may be concerned that the public may not fully appreciate how silly the constitutional provision has become. You may think that the focus on investigative journalism, for example, is something only people deeply embedded in Washington's political culture could appreciate. The amendment dodge may lead you regularly, perhaps permanently, to vote against what you believe would be truly valuable appointments and, from your point of view, to no good end.²³ Here, the difficulties of the amending process actually provide a reason for ignoring the Emoluments Clause as you understand it.

2. The Prudentialism Dodge

The third dodge is what I call the *prudentialism* dodge, where a conscientious constitutional decisionmaker properly takes practical consequences and realities into account in interpreting the Constitution. This dodge dissolves the problem

members of the public." *Id.* at 634. Note that one might distinguish the case from the present one on the ground that receiving a pension will take place so far in the future that the prospect of an improved pension plan could not possibly corrupt a senator.

22. See, e.g., U.S. CONST. amend. XXI (repealing the Eighteenth Amendment's prohibition against sale of intoxicating liquors); U.S. CONST. amend. XXII (setting presidential term limits).

23. To the extent that you cannot convince the public over the long term that the provision is silly, you might want to rethink your own judgment that it is. This is particularly so because the costs are only the marginal difference between appointing someone disqualified by the provision and appointing someone else. You may believe that the nation suffered because Stephen Breyer became a Justice rather than Senator Mitchell, but the amount of suffering may not be great.

by showing that the Constitution itself, considered as a whole, licenses a decisionmaker to ignore one of the Constitution's specific provisions. Sometimes practical consequences and realities can overcome the otherwise controlling words and purposes of the constitutional text. The prudentialist's central example is *Home Building & Loan Ass'n v. Blaisdell*.²⁴ In the midst of the Depression, Minnesota enacted a mortgage moratorium law that suspended foreclosures on defaulted mortgages. The statute was a classic debtor-relief law, apparently just the sort the Framers were attempting to preclude through the Constitution's ban on state laws impairing the obligation of contracts. Yet, in the face of the apparent difficulties caused by text and purposes, a sharply divided Supreme Court upheld the statute.

After an introduction explaining why the statute was in tension with the Contract Clause,²⁵ Chief Justice Hughes relied on "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare"²⁶ to explain the Court's holding. This, however, comes close to a pure prudentialist position. On one hand, there are the individual rights protected by the Constitution; on the other, there are the considerations of public welfare. Courts and legislators must reach a compromise between the two, which means that sometimes the Constitution gives way to concerns about real-world consequences and realities. Put more positively, the Constitution, properly interpreted, sometimes allows real-world consequences and realities to override the implications drawn from a more limited examination of text and purposes.²⁷

Finally, because conscientious decisionmakers can honestly disagree about the strength of practical consequences and realities, you should not be concerned that the Supreme Court might invalidate Senator Mitchell's appointment based on a different prudentialist assessment. You will have honored your oath by a fair-minded consideration of relevant matters, including text, purposes, consequences, and realities.

24. 290 U.S. 398 (1934).

25. *Id.* at 435-39.

26. *Id.* at 442.

27. The prudentialist dodge supplements the judicial review dodge by implying that a conscientious constitutional decisionmaker, including the Supreme Court, may ignore a constitutional provision he or she finds silly in today's world.

Blaisdell is surely a strong case for prudentialists. It may not, however, be enough to carry the day. First, Chief Justice Hughes's opinion went to some lengths to explain that Minnesota's mortgage moratorium law did not "impair" the obligation of contracts in a constitutional sense. Classic debtor-relief laws, Hughes argued, completely abrogated the debtor's obligation to repay. Minnesota's statute, in contrast, only temporarily suspended the debtor's obligation, under reasonable conditions. The statute did, of course, reduce the value of the obligation somewhat but not enough to amount to a constitutional violation.

Second, *Blaisdell* may not carry the day because other cases suggest the Court's discomfort with openly prudentialist arguments. For example, in *Immigration & Naturalization Service v. Chadha*,²⁸ Chief Justice Burger responded to the argument that the legislative veto was a useful device in controlling the execution of the law in light of extensive delegations of power to executive officials by saying:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made . . . There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided . . .²⁹

Third, and probably most important, prudentialism is in some tension with constitutionalism understood as a system of restraints on decisionmakers. Consider what a conscientious decisionmaker would do in a system without constitutional restraints on power. She would examine the situation carefully, locate all the relevant considerations, and decide what course of action best promotes the people's welfare. How do constitutional restraints change the decisionmaker's calculus? All they can do is withdraw some otherwise relevant considerations from the decisionmaker's ken.³⁰ Why do that? Perhaps on the ground that the decisionmaker's all-things-considered judgments are less likely to actually promote the people's welfare than would decisions based on less than all the relevant considerations. Why might that be so? Perhaps because the decisionmaker, driven by particular interests or incentives, may be

28. 462 U.S. 919 (1983).

29. *Id.* at 959.

30. See *infra* part II.B.3 (discussing the James Madison dodge).

particularly prone to poorly estimate the significance of the consideration that the Constitution withdraws from her ken.³¹

This is a fairly standard argument. I invoke it here only to point out the tension between full-fledged prudentialism and constitutionalism. Of course, you might respond, you are not advocating a full-fledged prudentialism that would completely displace text and purposes. Rather, you would take text and purposes into account in coming to your all-things-considered judgment.

3. The "James Madison was a Smart Guy" Dodge

Exactly what does it mean to take text and purposes into account as part of an all-things-considered judgment? Here the label is not one word but a phrase: "James Madison was a smart guy." That is, the Framers thought long and hard about how to design a well-functioning government. The very fact that they thought a provision important enough to include in the Constitution counsels against your conclusion that the provision is silly today. This, too, stipulates the problem away by eliminating the conflict that created it.

This dodge is insufficient to displace your all-things-considered judgment, because you have already built your appreciation of the Framers' wisdom into that judgment. Based on your understanding of the Framers' worries, you too worried, for example, that your own lurking hopes for an appointment by the President might have led you to overestimate the importance of investigative journalism today. But, having thought the problem through as thoroughly as you can, and having duly taken into account the Framers' wisdom, you have concluded that on this point they failed to appreciate how the political and economic life of the country would change in ways that now make the constitutional provision silly. James Madison, in short, was a smart guy, but he was not infallible.³²

31. The discussion here does not consider the standpoint from which someone determines whether all-things-considered decisions or restricted decisions actually promote the people's welfare. I note only that nothing in what I have said implies that constitutionalism requires that courts make such a determination. The mobilized public, for example, could make the decision.

32. My position here rejects Lawrence Lessig's. Lessig asserts that it is "the minimal requirement of fidelity" that "matters that were both contested and constitutionalized . . . continue to be binding." Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 TEX. L. REV. 839, 865 (1996).

4. The Conservation-of-Political-Energy Dodge

Recent writing focusing on the purpose of having a constitution appears to have converged on an answer to the question, "Why let judgments made in the past constrain today's all-things-considered judgments?"³³ Constitutions allow us to take some perhaps contentious issues off the table and thereby allow us to get on with the task of governing. As Stephen Holmes puts it, "If we can take for granted certain procedures and institutions fixed in the past, we can achieve our present goals more effectively than we could if we were constantly being side-tracked by the recurrent need to establish a basic framework for political life."³⁴ A constitution's drafters "emancipate[] the present generation" by "disencumber[ing]" it of the necessity to repeatedly revisit fundamental questions of constitutional order.³⁵ This dodge stipulates the problem away by insisting that only one choice is permissible.

I believe there are two related difficulties with this argument. First, it overlooks the problem created by interpretive ambiguity—even invented interpretive ambiguity. For example, once the possibility that rescinding a salary increase as a solution to the constitutional difficulty is on the table political decisionmakers have no choice but to spend some time considering what to do. Asking them to rethink the constitutional provision's wisdom calls on them to engage in a somewhat more substantial process than asking them simply to determine what the provision's words and purposes imply for the rescission question. But it seems unlikely that the marginal dissipation of political energy will be large.

Second, and perhaps more important, the standard argument may well offer good reasons for considering *some* constitutional fundamentals as provisionally settled.³⁶ Consider Jon

33. I should note that, because I find the difficulties with the now-standard answer so obvious, I fear that I may not fully understand it.

34. Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 216 (Jon Elster & Rune Slagstad eds., 1988).

35. *Id.*

36. Again, Holmes makes the point, although here somewhat obliquely: "[A] group can utilize its scarce resources more effectively if it dodges an irksome issue. By refraining from opening a can of worms, discussion leaders can prevent its lively contents from absorbing 100% of everyone's attention—at least for the time being." Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 34, at 19, 19-20. I stress Holmes's final qualification.

Elster's version of the argument:

[I]f all institutions are up for grabs all the time, individuals in power will be tempted to milk their positions for private purposes, and those outside power will hesitate to form projects which take time to bear fruit. Moreover, if nothing could ever be taken for granted, there would be large deadweight losses arising from bargaining and factionalism.³⁷

This could well be true, but note how much turns on the scope Elster gives the problem: "all institutions . . . up for grabs all the time." Elster's argument, which is only a specific version of the conservation-of-political-energy argument, does not explain why one must take any particular provision as settled at any particular time. We can gain nearly all the benefits of the conservation of political energy by allowing people to reconsider one constitutional fundamental at a time—perhaps one a year.³⁸

Some constitutional provisions, however, are so interconnected that it would be unwise to consider changing only one. It would not be sensible, for example, to consider reducing the terms of senators to four years without considering whether it makes sense to change the terms of representatives, or to have some or all senators elected in years in which there is no presidential election.³⁹ The Emoluments Clause, however, seems an unlikely candidate as a provision so closely connected to other provisions that altering or disregarding it would introduce broad instability in the constitutional system's daily operations.

III. AN ULTIMATELY UNHELPFUL FORMALIST DEFENSE OF AVOIDING ALL-THINGS-CONSIDERED JUDGMENTS

The dodges, then, do not solve your problem. Is there any other defense of interpreting the Constitution only on the basis

37. Jon Elster, *Introduction*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 34, at 1, 9.

38. Plainly, one would need some supplementary procedural mechanism to enforce the rule that the nation would reconsider only one fundamental within some specified period.

39. The apparent triviality of the Emoluments Clause is precisely what makes it a good vehicle for exploring the issues that I think most difficult in constitutional law. In the present context, for example, the Clause seems not so tightly connected to other constitutional provisions—though not, of course, unrelated to them—that it seems patently unreasonable to refuse to consider changing the Constitution to eliminate the Emoluments Clause and nothing else.

of text and purposes, or in any way other than by making all-things-considered judgments?⁴⁰ Refraining from making all-things-considered judgments, and relying on some criteria that, necessarily, is less comprehensive, is formalism. In the current context, relying on text and purposes, and refraining from making prudentialist judgments, is formalism. Frederick Schauer has provided our generation with the standard defense of formalism.⁴¹ But, as we will see, that defense, if successful, is suitable for *judicial* practices.⁴² I suspect that the nearly automatic assumption that other actors in the constitutional system ought to interpret the Constitution in the way courts do results from a failure to understand why the courts can justifiably be formalist, and why other actors need not be, and perhaps cannot coherently be, formalist.

A. A FORMALIST DEFENSE

Schauer's defense of formalism begins by observing that judges stand in a supervisory relation to other actors—lower court judges, executive officials, and legislators.⁴³ The judges have to articulate rules, standards, or guidelines that will lead those other actors to comply—to the greatest degree achievable—with the Constitution as understood by the judges. Consider a judge who arrives at an all-things-considered judgment about how a nation should design a good government and an account of how the Constitution is consistent with that judgment. The judge might nonetheless refrain from articulating that judgment as an interpretation of the Constitution because, in articulating the judgment, the judge is setting out a rule, standard, or guideline that other actors will follow when similar questions come before them.

The judge may think, however, that those other actors will be less adept at applying the rule, standard, or guideline than

40. The current litany is "text, structure, and history," but nothing turns on the precise formulation. In addition, nothing turns on the level of generality at which one specifies "structure" and "history." The now familiar "level of generality" problem functions to license a decisionmaker to make an all-things-considered judgment by manipulating the level of generality, but it does not in itself justify such manipulations.

41. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

42. And others similar in relevant respects, which, I argue, your position as a senator is not.

43. See generally, Schauer, *supra* note 41, at 515-20 (arguing that ultimately judges assess whether the behavior of other decisionmakers conforms to a particular rule).

is the judge herself. If the judge were confident that she, or people just like her, would be applying the rule, standard, or guideline, she would articulate it. But, because the other actors are not just like her—they are less talented, we might say—telling them to follow the rule the judge herself would follow may lead to lower levels of compliance with the Constitution as the judge understands it. Better, the judge might think, to give the other actors a less subtle rule, standard, or guideline, which they will find easy to apply. In the present context, the formalist directive is, “consider only text and purposes, but not consequences or practical realities.”

Let me use some made-up numbers to illustrate this defense of formalist adjudication. Suppose the judge has developed a set of rules, standards, and guidelines that, if applied accurately, would produce the absolutely best constitutional government (as the judge understands it). That government reaches a level of one hundred on a scale of good constitutional government. The judge also thinks, however, that if other actors applied that set to all the questions they face, they would reach only a level of eighty. That is, they would make twenty constitutional mistakes. The judge realizes that because of her limited ability to supervise lower level officials directly by reviewing and reversing their erroneous decisions, many—say, fifteen—of those constitutional mistakes will persist.⁴⁴

Can a judge improve the overall performance of the constitutional system? The defense of formalism asserts that she can. Suppose the judge can identify a specific reason that leads other actors into constitutional error, a consideration that, when injected into all-things-considered judgments, induces more errors than correct decisions. The consideration is relevant to an accurate all-things-considered judgment, and the judge herself takes it into account in making such judgments. The other actors, however, do badly when they try to use it. The judge might be able to achieve a higher level of compliance with the Constitution by directing those officials to refrain from taking that consideration into account.

By telling the other actors to follow a formalist rule, standard, or guideline, in other words, the judge can eliminate, say,

44. Of course, if the judge could review all lower-level decisions, compliance would be 100 from the judge's point of view. She would affirm all correct decisions and reverse all erroneous ones. Recall that, as the judge understands it, she herself makes perfect judgments; thus she can identify the correct and erroneous decisions with complete accuracy.

ten of the unreviewable constitutional errors. It is essential to emphasize, however, that the formalist approach may induce some new errors. Consider, for example, *Palmore v. Sidoti*.⁴⁵ There, a family court judge applied the standard of "the best interests of the child"—a classic all-things-considered standard—and concluded that the child involved would benefit more if placed with her white father than if placed with her white mother and an African-American stepfather.⁴⁶ A unanimous Supreme Court reversed, acknowledging that "[t]here is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."⁴⁷ The particular child in *Palmore*, in other words, may be worse off under the Court's formalist rule barring consideration of the effects of "private biases" on the child's well-being, because such biases are in fact relevant to the child's well-being. But, taking all child custody decisions into account, and in particular being aware that family court judges themselves may be infected by biases that lead them to make distorted all-things-considered judgments, the Court concluded that the formalist rule barring consideration of private racial biases would lead to more accurate determinations of what was in the child's best interest than a rule allowing family court judges to take everything into account.⁴⁸

The situation, then, is this: With a non-formalist set of rules, standards, and guidelines, we reach eighty-five on the scale of constitutional goodness. If we direct lower-level officials to follow a well-designed set of rules, standards, and guidelines, which includes some formalist elements directing them to ignore some considerations relevant to an accurate all-things-considered judgment, they will make, say, ninety correct decisions and ten mistakes. The judge can reverse five of those mistakes, so the system reaches ninety-five on the goodness scale. I should emphasize that the five uneliminated errors might be *new* ones. That is, they might be mistakes the lower-level decisionmakers would not have made if the judge had told them to make all-things-considered judgments. For example, the formalist approach might eliminate all the mistakes that lower-level actors would make under an all-things-considered

45. 466 U.S. 429 (1984).

46. *Id.* at 430-31.

47. *Id.* at 433.

48. *Id.* at 432-34.

approach, and induce ten new errors, of which five will be reviewed. A particularly poignant problem can arise for a judge under these circumstances. The circumstances may present the judge with one of those new or induced errors. *Palmore v. Sidoti* may be an example. The appellate judge may say to herself, "If I made an all-things-considered judgment, I would award custody to the father here." Indeed, that is what the family court judge did. "But I can improve the system's overall performance by articulating a rule barring consideration of private biases. To do so, I will have to reverse the family court's custody decision, knowing that I am directing that the court award custody to the 'wrong' parent."⁴⁹

Consider the following chart:

	All-things-considered Approach	Formalist Approach
Correct initial decisions	80	90 (consisting of 70 previously correct decisions and all 20 previous errors)
Mistakes	20	10 (consisting of 10 previously correct decisions)
Unreviewed mistakes	15	5

The system's overall performance has improved from eighty-five to ninety-five. I should note several points. I have offered a formal defense of formalism, in the sense that I have shown how a set of rules, standards, and guidelines that includes some formalist elements might improve the system's performance over what it would achieve if the set had no such elements. This is not to say, of course, that any particular formalist rule, standard, or guideline actually does improve the system's performance. Some formalist elements might induce

49. This shows why a common criticism of formalism, that it leads decisionmakers to make mistakes that they would not make if they made all-things-considered judgments, is itself mistaken.

more errors than they eliminate.⁵⁰

B. THE DIFFICULTY WITH THE FORMALIST DEFENSE

The defense of formalism turns on the fact that the person devising the set of rules, standards, and guidelines stands in a supervisory relation to other actors. Otherwise, formalism could induce more errors than it eliminates. Perhaps when judges tell other actors to follow the formalist approach—"consider only text and purposes, but not consequences and practical reality"—they will improve the system's overall performance. When the decisionmaker is not articulating a set of rules, standards, and guidelines for other decisionmakers to follow, however, this defense of formalism is unavailable.

Consider in this connection the proposition that the Framers stand in the appropriate relation to contemporary decisionmakers. That is, they specified a set of formalist rules for today's decisionmakers to follow, because they concluded that the public good would be maximized if they barred decisionmakers from making all-things-considered judgments. One difficulty should immediately become apparent. How can the Framers guarantee that today's decisionmakers will in fact comply with their formalist directives? Judges supervising police officers may ensure compliance by reviewing their actions, but the Framers cannot act similarly.

More importantly, the formalist defense actually assumes its conclusion. Recall that a formalist judge decides that she would maximize the public good, *as she understands it*, by issuing and enforcing formalist directives. Return to the question you face as a senator. You have decided that you would maximize the public good, *as you understand it*, by making an all-things-considered judgment. You have no reason, other than the "James Madison was a smart guy" dodge, to accept the (asserted) Framers' judgment.

You understand the value of directives to follow only text and purposes. The very fact that the Supreme Court has articulated such directives in other contexts reflects the Justices' determination that you, among other lower-level officials, are less adept at making all-things-considered judgments than are the Justices. Two things, however, naturally occur to you. First, on the assumption that courts will not perform judicial

50. This is the standard criticism, for example, of the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990).

review, no one else is ever going to make an all-things-considered judgment. Your all-things-considered judgment may in fact be worse than the Justices', but you are the only one who is in a position to make any such judgment at all. Because formalist approaches can induce errors, you have to worry that, if you rely only on text and purposes to override your all-things-considered judgment, you will be making one of those induced errors.

Second, and more importantly, you do not have to share the Justices' evaluation of your abilities relative to theirs. They may think that they are more adept than you are; that is hardly surprising. You may think, in contrast, that their evaluations of relative abilities are shaped by their own self-interest and, more generously, by their isolation from problems of making a wide range of decisions about public policy with constitutional overtones in a pluralist society. The fact that they think they are more adept than you are is, of course, a datum for you to take into account, but it is hardly conclusive for you—and, I should add, for anyone else in the polity—on the question.

C. A SERIOUS PROBLEM WITH THIS ANALYSIS

Now, shift attention from your problem as a senator to the problems faced by police officers daily. Suppose a police officer believes that the Supreme Court's decision in *Arizona v. Hicks*⁵¹ is as silly as they come. There, the Supreme Court held that a police officer, lawfully present in a suspect's apartment, violated the Fourth Amendment when he shifted a television set around to see its registration number.⁵² Are the arguments I have made available to the officer as well?⁵³

The first point to note is that I have insisted that the decisionmaker act conscientiously. That includes serious deliberation on the Constitution's purposes with particular consideration of the possibility that the decisionmaker's judgment may

51. 480 U.S. 321 (1987).

52. *Id.* at 325-28.

53. I note, only to put aside, an additional question this example raises: Should we treat the Supreme Court's interpretation of the Constitution as if it were the Constitution itself. As a general matter, it seems to me that the answer is clearly no; but to avoid elaborating that argument here, I simply assume that the Supreme Court's decision in *Hicks* is precisely what careful and dispassionate analysis of the Fourth Amendment's requirements would produce.

be distorted by the pressures of the moment.⁵⁴ The officer *may* engage in such deliberation. Like the senator skeptical about the Justices' ability to appreciate how contemporary politics actually operates, the officer may be skeptical about the ability of Supreme Court Justices, who are removed from the day-to-day exigencies of law enforcement, to accurately assess the Fourth Amendment's requirements. Even so, I suspect that many people would themselves be skeptical about the proposition that police officers would in fact act conscientiously.⁵⁵

Second, at least as a matter of constitutional form, all decisions by police officers are ultimately subject to judicial supervision. An officer who disregards *Hicks* runs the risk that the people will not prosecute, that courts will exclude evidence, or that appeals courts will reverse a subsequent conviction. The officer will have imposed the costs of arrest and perhaps prosecution on someone who ultimately will go free. Even if the officer conscientiously concludes that *Hicks* was wrongly decided, surely we can fairly conclude that so acting, with these consequences, is quite imprudent.⁵⁶

So much for form. What of reality? Suppose the police officer, again acting conscientiously, calculates that the risk of losing a conviction is quite low. Most defendants plead guilty, and many judges—less conscientious than the officer, perhaps—will distort rather than disregard *Hicks* in an effort to save a conviction. As a practical matter, the officer is the final and unreviewable decisionmaker. Does the officer act in a constitutionally inappropriate manner if he disregards *Hicks*?

One answer is yes, on the ground that form matters far more than practical reality. I am puzzled, however, about why. One possibility would emphasize that the form at issue here is an aspect of the hierarchical structure of our constitutional system. It would distinguish between the Constitution's structural provisions, which establish the framework for determin-

54. For present purposes, conscientiousness requires only that the decisionmaker have available and be willing to produce in an appropriate arena reasons justifying his or her actions. It does not require that the decisionmaker actually produce them on the occasion of acting.

55. They might cite Justice Jackson's comments on the "often competitive enterprise of ferreting out crime." *United States v. Johnson*, 333 U.S. 10, 14 (1948).

56. I am willing to treat imprudence as a constitutionally relevant consideration. Note as well that the imprudence argument is available, though in my view carries little weight, if a senator alleviates her concern over voting for Senator Mitchell's confirmation by invoking the judicial review dodge.

ing what the rules of the game are, and its substantive provisions, some of which specify those rules. One might be willing to let decisionmakers, whose primary charge is setting the rules of the game, decide for themselves what the Constitution's structural provisions mean, while denying similar authority to those charged with administering the rules. That distinction seems to me defensible only on the supposition that the incentive to engage in conscientious deliberation about all the relevant considerations is greater for the former group of decisionmakers. For myself, I doubt that that is true.

The other answer is no. As you would, the police officer acts appropriately in disregarding a constitutional provision that, all things considered, obstructs the achievement of the public good.

Finally, we might develop a thought offered by Charles Black a generation ago. Black argued that judges ought not give the same deference to decisions by investigators and prosecutors that they might give to decisions by legislators.⁵⁷ The reason goes beyond the question of the scope of judicial review. Decisions by elected legislators have greater democratic justification than decisions by even the most conscientious police officer. A legislator might therefore have broader authority to make all-things-considered judgments.

IV. IN THE DIRECTION OF AN ANSWER

I suspect that nearly everyone will be uncomfortable with the conclusions I have reached, even though I have sometimes only described competing considerations and suggested how I would resolve the questions without concomitantly suggesting that my resolution is the only sensible one. The senator's problem may seem less bothersome than the one posed by the conscientious police officer, both because the Emoluments Clause seems like a hypertechnical constitutional provision and because we may think that senators are more likely than police officers to deliberate seriously about the public good.⁵⁸

57. See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 69 (1969) ("Whose action is the court annulling? Whom is the Court second-guessing?"). Black further posits that, "The only constitutional judgments made on this investigative technique, before the case came under the judicial hand, were made by investigators and prosecutors." *Id.* at 78.

58. I note that police officers may well think that the Fourth Amendment is a hypertechnical constitutional requirement and that the comparison be-

The underlying concerns are serious, however, and addressing them points in the direction of an answer to the hardest problem in constitutional law. To show how, it will help to return to the earlier discussion of constitutions as a way of conserving political energy.

A. THE SLIPPERY SLOPE CONCERN

Perhaps one might agree that we would conserve political energy if Congress could place only one constitutional fundamental on the table during any particular year. But, one might believe, that would open a can of worms, to use Holmes's phrase. After all, why should the Emoluments Clause be this year's candidate for reconsideration rather than, for example, the Constitution's ban on term limits for members of Congress?

This is a slippery slope argument, which comes in several variants.⁵⁹ The basic form is, of course, familiar. If you allow your conscientiously arrived at all-things-considered judgment to override the Constitution's text and purposes today, you run the risk that you and your colleagues will follow your example in the future. Although you are convinced that your judgment today is correct, you may worry that next time around your judgment, or your colleagues' judgment, might not be as good.⁶⁰

The first variant of the slippery slope argument focuses on your colleagues. Here, the problem you face, on the first level, is simple. You are thinking about foregoing your own best judgment about what you should do because you fear that your colleagues will later use your behavior concerning the Senator Mitchell nomination as a precedent for overriding the Constitution's text and purposes when, as a matter of fact, an all-things-considered judgment ought to lead them to follow the text and purposes. The difficulty lies in the fact that you are going to give something up today with no guarantees that your colleagues will reciprocate when they are again faced with the question of whether to allow their all-things-considered judgments to displace text and purposes.⁶¹ When the time comes

tween police officers and senators is invidious and erroneous. So may others.

59. For a classic discussion of such arguments, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

60. This is what Schauer calls the problem of "limited comprehension." *Id.* at 373-76. People in the future may not understand the complexity of the all-things-considered judgment you made today, and may erroneously believe that their judgments are entirely compatible with yours.

61. See Paulsen, *supra* note 4, at 911-14 (suggesting that Republicans refrained from nominating Orrin Hatch to replace retiring Justice Lewis F.

and you complain that you voted against Senator Mitchell's confirmation because you thought that such judgments could never displace text and purposes, they can sensibly respond, "But you were wrong." As Michael Stokes Paulsen puts it, "Why play fair and lose when everybody else plays unfairly?"⁶²

The second variant of the slippery slope argument focuses on your own actions. You are convinced that you have conscientiously arrived at the best all-things-considered judgment as to the Mitchell nomination, but you may fear that next time around, your judgment may not be as reliable as you think it is now. Here, too, the problem is obvious. When the time comes, you may realize that your judgment is not as reliable, in which case you will not follow it. How are you in a better position, then, to recognize its unreliability if you refrain from acting on what you today believe to be a reliable judgment? Or, perhaps more likely, when the time comes you will not realize that your judgment is unreliable.⁶³ How will the fact that you voted against Senator Mitchell's confirmation today improve your assessment of your judgment tomorrow?

I suspect that if you vote against Senator Mitchell today, and a similar question comes up in the future, you are likely to regard your vote against Senator Mitchell as a mistake you ought not repeat, rather than as a precedent you should follow. You may ask yourself, "Why deprive the nation of a valuable public servant twice instead of only once?"

The difficulties with these slippery slope arguments are not conclusive. In one sense, both variants confront the difficulty that action today is designed to induce action tomorrow with no enforcement mechanism. If you could insert some sort of enforcement into the scheme, the slippery slope arguments might explain why you should refrain from voting to confirm

Powell because of a perceived Emoluments Clause problem). The problem discussed in the text would have arisen if the President had nominated Senator Mitchell and Congress had enacted a salary rescission.

62. *Id.* at 914-15; see also Mark V. Tushnet, *Clarence Thomas: The Constitutional Problems*, 63 GEO. WASH. L. REV. 466, 471-72 (1995) (book review) (describing strategic difficulties that arise when one side in a constitutional dispute takes one view of underlying premises and the other takes a different view).

63. Facing a new issue about which you feel deeply, you may unconsciously overvalue the benefits of disregarding the Constitution's text and purposes in the new context, explaining to yourself that your prior behavior makes such overriding permissible and failing to recognize the distortions of judgment in the present case even though your judgment in the prior one was undistorted.

Senator Mitchell.

Consider, then, the actions you hope to induce. With respect to your colleagues, you want them to exercise some forbearance, so that they refrain from acting on *their*—in your mind erroneous—all-things-considered judgments. With respect to yourself, you want to enhance your ability to recognize the unreliability of your all-things-considered judgments.

One strategy for inducing those actions is to generate character traits associated with deliberation and forbearance. If your colleagues have such traits, when the time comes, they will forebear from acting on their all-things-considered judgments and, if you have such traits, you will have a keen appreciation of the limits of your own judgment. The question then is how can you build such character traits. Perhaps you can do so by modeling them today. That is, you can demonstrate the importance of forbearance to your colleagues by forbearing yourself. They might come to emulate your exemplary behavior. Similarly, you can teach yourself to be cautious about the reliability of your own judgments, by refraining from acting on your all-things-considered judgment about Senator Mitchell and the Emoluments Clause, even though you firmly believe today that you have arrived at the right all-things-considered judgment.

I find the character-building account of why you might vote against Senator Mitchell's confirmation despite your best all-things-considered judgment to be the strongest argument available.⁶⁴ Jon Elster, however, has identified a serious difficulty with that account. According to Elster:

Some mental . . . states . . . have the property that they can only come about as the by-product of actions undertaken for other ends. They can never, that is, be brought about intelligently or intentionally, because the very attempt to do so precludes the state one is trying to bring about.⁶⁵

The character trait of constitutional forbearance might be such a state. You cannot acquire it by trying to acquire it, or by knowingly forbearing. Elster suggests that what he calls "technologies for self-management" can produce these states.⁶⁶ Procedural rules that keep you from considering whether to vote for a nominee whose appointment might violate the

64. See *infra* part IV.B (discussing the character building argument).

65. JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 43 (1983).

66. *Id.* at 53.

Emoluments Clause are, perhaps, an example of such a technology. The question has been put to you nonetheless. If forbearance is a by-product state, you do no good by forbearing in order to build character.

B. THE CONSTITUTION AS CULTURE

I believe it is possible to generalize the character-building argument. Some political scientists who study the Constitution have observed that the people of the United States are, in some fundamental sense, constituted by our commitment to the Constitution and the principles of the Declaration of Independence.⁶⁷ At the level of national self-definition, a commitment to constitutional principles—not race, religion, nor ethnicity—defines the people of the United States.

Allowing public officials to disregard the Constitution in favor of their conscientious all-things-considered judgments might compromise the people's self-understanding as a people. That is, the slippery slope is not one in which decisionmakers get more and more comfortable with trampling on constitutional rights. Rather, it is one in which the people of the United States lose the only thing that constitutes us as a people—adherence to constitutional principles. The people would doubt that you voted for Senator Mitchell's confirmation on the ground that, all things considered, the Emoluments Clause was silly. Rather, they would see you as having acted anti-constitutionally. And acting anti-constitutionally, it might be said, rejects our national identity.

I should pause here to respond to the question: Why should anyone be concerned about preserving a national identity? The answer, I think, must be fundamentally Aristotelian. Having connections to historically embedded communities is either a fundamental human good, which all social orders ought to seek to achieve, or an inescapable aspect of the human condition. Still, one can be connected to many such communities—one's family or one's religious group, for example. Preserving a national identity of the sort we have in the United

67. See, e.g., GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 5 (1993) ("[T]hey introduce and outline the intellectual contours for constitutional discourse about how these societies arrange their fundamental rules and governing practices."); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 5 (1988) ("Pledging faith in the Constitution, therefore, presumably defines one as a 'good American,' a full member of our political community.").

States is important only if being connected to a historically constructed *political* community is a fundamental human good or aspect of the human condition.

I believe that such a connection is a fundamental human good. But does acting anti-constitutionally *reject* the American national identity, constituted as it is by adherence to constitutional principles? Perhaps not. Rejecting silly constitutional provisions piecemeal⁶⁸ does, however, *change* two elements in the people's national identity. Narrowly, it changes the particular constitutional provision at issue. Surely, however, a people constituted by a constitution without the Emoluments Clause would not be so different from the one constituted by the existing Constitution that they would lose the fundamental human good of having a connection to a historically embedded political community.

More broadly, rejecting silly constitutional provisions changes our understanding of how constitutional change can permissibly occur. I doubt that even this change implies that the people are no longer constituted by a commitment to the Constitution's principles. Rather than seeing the Constitution as embracing a fixed set of principles, we can see it in terms suggested by Bruce Ackerman: as an "aspiration-creating machine" that allows us to transform ourselves, adopting new principles while preserving those most fundamental to our constitutional identity, the Declaration's principles.⁶⁹ The "we" who exist after the transformation are the same as the "we" who existed before, because we will have used the Constitution's forms as the machine for our self-transformation while concomitantly maintaining our core commitments.

By this point, if not earlier, the argument has a decidedly odd cast. It is too fancy and academic. Imagine a senator who asked what the Emoluments Clause meant and was told that it meant that rescinding a salary increase could not solve the Senator Mitchell problem. I am quite confident that, for nearly all senators, that explanation would end the matter. How could they vote for Senator Mitchell's confirmation after learning that the Emoluments Clause meant that he could not take a seat on the Supreme Court? They and their constituents would feel that they would be breaking the faith that was

68. A condition inserted to deal with the conservation-of-political-energy argument.

69. Telephone Interview with Bruce Ackerman, Professor of Law, Yale Law School (Spring 1996).

embodied in their oath of office.

I was careful to say, however, that this would be true for nearly all senators. While not every political actor has the talent and capacity to lead the American people in transforming our constitutional self-understanding, the example of Abraham Lincoln shows that some do. A senator with the ability to lead such a transformation might appropriately use the vote on Senator Mitchell's confirmation as part of the transformative process. A lesser senator would act inappropriately in pursuing a course for which she was not well-suited.⁷⁰

C. THE ULTIMATE DODGE?

In this light, one might reconstrue the entire argument in constitutional terms. As a senator, you occupy the position you do because the Constitution is a document that creates a frame of government. That document licenses you to act as you do, even to the point of disregarding other constitutional provisions. At least, one might think, it does so when you act conscientiously. Here, we can give a precise, and constitutional, definition of acting conscientiously. You do so when your all-things-considered judgments are guided by constitutional principles as articulated in the Preamble and the Declaration of Independence. In short, it is consistent with the entire Constitution for you to vote to confirm Senator Mitchell's appointment, despite your best understanding of the most directly applicable constitutional provision, if you conclude that confirming Senator Mitchell's nomination would "establish Justice[,] . . . promote the general Welfare, and secure the Blessings of Liberty to . . . posterity," within a framework committed to the principles of equality and inalienable rights embodied in the Declaration of Independence.⁷¹

Perhaps, however, this is simply the ultimate dodge. We have dissolved the senator's problem by reducing the entire Constitution to the Preamble and the Declaration. This raises two questions. The less difficult question is: What is the point of having specific constitutional provisions if the Constitution, when properly interpreted, consists simply of the command to promote the general welfare? Perhaps the specific provisions

70. As the Emoluments Clause example suggests, particular issues might be so hypertechnical that even the most able leader would find it impossible to use them in this transformative way.

71. U.S. CONST. preamble.

function as default rules written by particularly intelligent people and, therefore, congressmembers ought to follow them unless it seems worthwhile to expend the political energy to displace those rules. But when, on reflection, the default rules appear to obstruct the promotion of the general welfare, legislators can disregard them.

The more difficult question is: Doesn't this view of the Constitution deprive it of any important connection to the people of the United States who, I have suggested, are constituted by it? That is, would not a conscientious decisionmaker in *any* constitutional system take promoting the general welfare to be her aim? Conscientiousness in a legislator might be defined in part precisely by the legislator's orientation to the general welfare. If being conscientious just means promoting the general welfare, the U.S. Constitution is not at all distinctive, and so cannot provide the important human good of membership in a particular political community.

Here, too, the Declaration may play an important role. Although historically it is the origin of our nation's constitutional commitments, those commitments themselves are universal in aspiration. "All men," after all, were "created equal" and were "endowed by their Creator with certain inalienable rights."⁷² If we see the Constitution and the Declaration working together, we would conclude that the people of the United States are constituted by our commitment to the realization of universal human rights which, when realized, would render the community—defined as "the people of the United States"—politically unimportant. It is not an entirely unattractive self-understanding.

V. CONCLUSION

I began writing this Lecture thinking that I knew what the hardest question in constitutional law was: Why should anyone limit her interpretations of the Constitution to text, structure, and history? In the course of thinking about that problem, however, I discovered a different, and for me, even harder question: May a conscientious constitutionalist disregard some constitutional provisions? One might perhaps identify constitutional provisions that are evil. Perhaps the question, "Should I comply with an evil provision?" is not that difficult, although some abolitionists thought it was before the Civil

72. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

War. Perhaps, as I have suggested about the Emoluments Clause, some constitutional provisions are silly. The question, "Should I comply with a silly provision?" appears to be more difficult.

An even more difficult question arises when a constitutional provision is "merely" suboptimal. Such provisions mean that we would have a better government if we arranged our constitutional order differently. Why, then, should anyone insist on adherence to suboptimal constitutional provisions? In short, why should anyone comply with the Constitution when abandoning it would improve our constitutional order?⁷³ I have attempted to answer that question. But, as my answer developed, I again realized that I may have merely uncovered a still harder question: Assuming that there are occasions on which a decisionmaker may properly disregard the Constitution, what are those occasions, and what general criteria are there, if any, for identifying them?

73. Colleagues have suggested to me that this question is really no different from the question, "Why should anyone comply with the law." Perhaps it is not different. Consider the following:

[T]he average citizen who runs the stop sign when no other cars are approaching, is not allowed to argue that he should be relieved of his legal obligation to stop because he did not offend against the "intent" of the sign or the "spirit" of the regulation that it manifests. The common man is expected to obey. Why, then, cannot he expect a similar manifestation of restraint, simple obedience, and rectitude from his own Government?

Hearings, *supra* note 11, at 43.

But see Daniel A. Farber, *The Jurisprudential Car Ride: A Socratic Dialogue*, 1992 BYU L. REV. 363, 369 (asserting that a society with "less trust" than it could have is "morally inferior"). In my view, Farber's defense of the proposition that there is an obligation to obey the law flounders on this undefended assertion. My sense is that a society with "enough" trust is not necessarily inferior to one with more.

With respect to the stop sign, the ordinary citizen is not in a position to change the law, whereas a senator is. But, with respect to the Constitution, a senator is not in a position to change the law either.

